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No. 00 - 404

IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

JULIE DUNCAN, on behalf of herself and all others similarly situated,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 105(a)(1) of the Airline Deregulation Act preempts state laws and regulations "related to a price, route or service of an air carrier." 49 U.S.C. § 41 713(b)(1). The question presented is whether the Court should except review of a Ninth Circuit unanimous opinion, which held consistent with opinions of this Court and the circuit and district courts to address the issue, that absent an express indication of preemption, respondent's claim for personal injuries incurred in her work as a flight attendant was not preempted. Stated alternatively, whether there is conflict in a decision holding in harmony with the Fifth Circuit and other district courts addressing the issue, that a tort award in a personal physical injury action relates too tenuously to any "service" of an airline to warrant preemption.

RULE 29.6 STATEMENT

Pursuant to Sup. Ct. Rule 29.6, respondent hereby states that she is an individual and thus has no corporate parents or subsidiaries.

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ADDITIONAL STATUTORY PROVISION INVOLVED

In addition to the provision identified by petitioner, another statutory provision involved is 49 U.S.C. § 41112 (amending 49 U.S.C. § 1371 (1978)). This provision states in pertinent part:

> Liability Insurance. The Secretary of Transportation may issue a certificate to a citizen of the United States to provide air transportation as an air carrier under section 41102 of this title only if the citizen complies with regulations and orders of the Secretary governing the filing of an insurance policy or self-insurance plan approved by the Secretary. The policy or plan must be sufficient to pay, not more than the amount of the insurance, for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft under the certificate. A certificate does not remain in effect unless the carrier complies with this subsection.

STATEMENT OF THE CASE

A. Northwest's Failure To Provide a Safe and Hazard-Free Work Environment

At the time this case was filed, every other U.S. airline had banned smoking on both North American and international flights with the exception of Northwest. Rather, Northwest continued to allow smoking on most flights to and from Asia as well as flights within Asia. Northwest allowed toxic fumes to bellow through the stale air on its planes despite banning smoking at its own corporate headquarters to protect the "health of [its] people." To Northwest, it was simply a business decision. To maintain profits in its Asia-market, Northwest callously decided to expose its workers to unsafe working conditions that it would not permit at corporate headquarters, by requiring that flight attendants work for long hours in smoke-filled international flights.

As set forth in the complaint, it was not unusual for Plaintiff-Respondent, Julie Duncan, a Northwest flight attendant, "to have a runny nose, watery eyes, irritation of mucus membranes, and breathing discomfort within the first 30 minutes of take-off." Indeed, a "thick blue haze usually hangs over the smoking areas. [Ms.] Duncan often finds herself unconsciously holding her breath as she serves drinks and meals to smokers." After flying, Ms. Duncan continues "to battle sinus, bronchial and inner ear infections which sometimes last weeks." Ms. Duncan is informed and believes that "some flight attendants on smoking flights suffer from severe physiological ailments such as asthma, allergies, and chronic pulmonary conditions." Ms. Duncan

herself "has been diagnosed with limited pulmonary function and other chronic infections."

In her complaint, Ms. Duncan seeks compensation for the physical injuries suffered from the inhalation of toxic fumes in the work place. In addition, she requests that a medical monitoring fund be set up to deal with employee physical injuries derived from the inhalation of toxic fumes.

B. Course of Proceedings Below

Ms. Duncan filed her complaint on January 13, 1998 in Washington Superior Court In and For King County. On February 2, 1998, the case was removed to United States District Court for the Western District of Washington at Seattle.

Shortly thereafter on March 2, 1998, Northwest Airlines filed a motion to dismiss asserting that Ms. Duncan's entire claim was preempted by the Airline Deregulation Act ("ADA"), now codified at 49 U.S.C. § 41713(b)(1). *See* Pet. App. 20a.

Simply put, Northwest asserted that smoking was a "service" and, in as much as Ms. Duncan's injuries were derived from the service of smoking – they were preempted. In her opposition, Ms. Duncan defended her complaint on two grounds – either capable of defeating Northwest's motion to dismiss. First, Ms. Duncan pointed out that relevant case law suggests that a personal injury lawsuit *is not* the equivalent of "a law, regulation, or other provision having the force and effect of law." Second, Ms. Duncan's injuries do *not* derive from a "service" Northwest chooses to offer.

In analyzing the motion to dismiss, the district court found "two questions at the heart of whether § 105 preempts Duncan's state law claims." Pet. App. 10a. First, whether a personal injury action triggers the application of the preemption provisions. Second, whether smoking is in fact a service sufficient to warrant preemption. *Id.* Erroneously, the district court answered both questions in Northwest's favor.

Ms. Duncan immediately appealed to the Ninth Circuit and during the pendency of the appeal, the Ninth Circuit issued its *en banc* decision in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998), *amended*, 169 F.3d 594 (9th Cir. 1999). The *Charas* case involved five personal injury cases consolidated for appeal. In *Charas*, the court held that personal injury claims relating to fallen luggage, spilled drinks, failures to meet and assist and the like were not "related to" a "service" within the context of ADA preemption. 160 F.3d at 1266. More importantly, the *Charas* court determined that "when Congress enacted federal economic deregulation of the airlines, it intended to insulate the industry from possible state economic regulation as well. It intended to encourage the forces of competition. It did not intend to immunize the airlines from liability for personal injuries caused by their tortious conduct." *Id.*

The *Charas* court began its analysis by focusing on Supreme Court precedent, *American Airlines v. Wolens*, 513 U.S. 219, 230 (1995) and *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992), as well as prior Ninth Circuit opinions. The court next turned directly to the statute, finding that "[n]othing in the Act itself, or its legislative history, indicates that Congress had a 'clear and

manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'" *Id.* at 1265 (citing *Morales*, 504 U.S. at 390). Moreover, two provisions of the Act – the requirement that airlines carry insurance and the savings clause – suggested to the court that tort claims for physical injury were not contemplated within the preemptive scope. 160 F.3d at 1264.

Additionally, the *Charas* court, being "mindful that principles of statutory construction require us to consider the term within its context," *id.* at 1265 (citing *Pension Benefit Guar. Corp. v. Carter & Tillery Enters.*, 133 F.3d 1183, 1186 (9th Cir. 1998)), set forth a definition of "services" that made sense given its position next to the terms "rates" and "routes." The court defined the term "services" as referring "to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66.

Though Northwest suggests the contrary, this definition of "service" was not the court's sole rationale for determining that the five consolidated cases before it were not preempted. Rather, simply stated, *Charas* found that claims like Ms. Duncan's, did not affect the purpose and intent of the ADA, i.e., economic deregulation of airlines. 160 F.3d at 1265 (citing *Wolens*, 513 U.S. at 230; *Morales*, 504 U.S. at 390). As *Charas* held, the "purpose of preemption is to avoid state interference with federal deregulation. Nothing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'" *Id.* (quoting *Morales*, 504 U.S. at 390)).

With the *Charas* opinion in mind, the Ninth Circuit panel in this case held that Ms. Duncan's personal physical injury claims were not preempted. The panel determined, like *Charas*, that permitting passengers to smoke on flights, like permitting passengers to drink in-flight beverages, deals with "amenities" an airline offers and not with a particular service. Pet. App. 6a. However, also like *Charas* this definition of "service" was simply not the sole basis of the panel's finding. Indeed, as the panel specifically stated, even if smoking were a service, "the connection between an award in a tort case and an airline's 'service' is simply too tenuous." Pet. App. 6a-7a.

REASON FOR DENYING THE PETITION

This case presents no question of fundamental importance as the Ninth Circuit in this case, like the Fifth Circuit and district courts presented with the same or similar facts, has determined that section 105(a)(1) of the ADA, which preempts any state "law, regulation, or other provision having the force and effect of law related to a price rate route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), does not preempt personal physical injury claims. While there has been a disagreement among the Fifth and Ninth Circuits as to the proper definition of the word "service" in the ADA, there has been harmony among the courts as to the intent of the ADA. This harmony produces a consistent result despite the differing definitions of the term "service." Simply put, while the Fifth and the Ninth Circuits have defined "service" in different ways, both circuits have found that regardless of the definition, a tort award in a case involving personal physical injury is simply too tenuously related to any "service." *Hodges v.*

Delta Airlines, 44 F.3d 334, 339 (5th Cir. 1995) ("[E]nforcement of tort remedies for, personal physical injury ordinarily has no 'express reference' to services as defined above.")); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265 (9th Cir. 1998) ("Nothing in the Act itself, or its legislative history, indicates that Congress had a 'clear and manifest purpose' to displace state tort law in actions that do not affect deregulation in more than a 'peripheral manner.'"); *Duncan v. Northwest Airlines, Inc.*, No. 98-35617 (9th Cir. Apr. 6, 2000) ("the connection between an award in a tort case and an airline's "services" is simply too tenuous") (Pet. App. 7a).

In light of the harmony among the courts on the issue of personal physical injury claims under the ADA, Northwest's concern about the Ninth Circuit's "narrow interpretation of the ADA preemption provision" frustrating the goals of Congress is simply not ripe for review. Pet. 7. The issue in this case is whether a personal physical injury claim is "related to" a "service." Courts across the country have found that personal physical injury claims are not so related. As a result, to date, there have been no inconsistent rulings on this issue.

Most troubling, Northwest asserts that the "effect" of the Ninth Circuit's definition of "services" causes a disservice to the congressional goal to promote competition. This is because, according to Northwest, in the Ninth Circuit, state regulation of matters not directly involving prices or routes may proceed unfettered while, in several other circuits, "it is well established that such state law causes of action would be preempted." Pet. 8 (citing *Hodges*). But it is not so well established with respect to physical injury claims and Northwest must know that fact. Indeed, Northwest's Petition cites to nineteen cases only

three of which involve personal physical injury. *See Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999) (Pet. 16, n.6); *Charas*, 160 F.3d 1259; *Hodges*, 44 F.3d 334. Notably, in all three cases, the physical injury claims were not preempted by the ADA. Hence, Northwest is not even able to cite to a decision in its entire Petition that renders a result different from that in the court below.

Contrary to Northwest's fears, the differing definitions of the term "service" will not subject the airline to patchwork regulation or require an airline to change its conduct from terminal to terminal. Pet. 8. Indeed, prior to a recent federal regulation that prohibits smoking on flights, Northwest itself choose to ban smoking. And its own business decision demonstrates that avoiding liability inducing conduct is possible without changing conduct from terminal to terminal. Hence, the threat of a tort award does not mean that the airline must change its behavior from place to place. It simply means that if its behavior produces a physical injury – it will be held to the same standard as any tortfeasor. Thus, contrary to the central theme of Northwest's petition, the airline industry and its ability to compete, is simply not being jeopardized by a lawsuit of this kind.

The core issue in this case is whether a lawsuit seeking damages for physical injury may proceed against an airline based on the airlines alleged wrongful conduct. The Ninth Circuit in this case and *Charas* correctly decided that Congress never intended to immune airlines from tort liability stemming from personal injuries. The Fifth Circuit in *Hodges* held the same. Northwest has not, because it cannot, point to a single circuit court opinion that held that a similar personal physical injury claim should be preempted under the ADA. Similarly, Northwest has not,

because it cannot, point to a single circuit court opinion finding that allowance of such a claim runs afoul of the goals of airline deregulation. On the issue of personal physical injury claims, the circuits are in harmony. As a result, review of the approach adopted by the Ninth Circuit in this case is neither "pressing" nor "urgent" as Northwest suggests. Simply put, holding airlines accountable for negligent and/or intentional conduct, which results in physical injury to passengers and crew, is not economic regulation. And all circuits, like the Ninth Circuit, agree. Rather than giving "carte blanche" to states to regulate how an airline competes, the decision of the Ninth Circuit simply requires Northwest to compensate its employees for failing to provide a safe and hazard-free work environment, a requirement imposed on all corporate America. There is nothing novel or urgent arising from the imposition of due care.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS THAT WARRANTS REVIEW

A. The Purpose of the ADA is to Encourage Competition Not Shield Airlines From Liability for the Physical Injury They Cause

The ADA unwound much of the Federal Aviation Act of 1958,[1] which reserved broad powers to the federal government to regulate interstate airfares and promulgate

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[1] In 1994, the ADA, originally located at 49 U.S.C. § 1301, *et seq.*, was recodified at 49 U.S.C. § 40120, *et seq.* and termed the Federal Aviation Authority Authorization Act ("FAAAA"). The preemption clauses of the ADA, 49 U.S.C. § 1305 (also referred to as section 105) and of the FAAAA, section 41713, are analogous, and thus, may be referred to interchangeably.

and enforce various requirements. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). The purpose of the enactment was to "dismantle the pervasive federal economic regulation of the interstate airline industry." *Fenn v. American Airlines*, 839 F. Supp. 1218, 1220 (S.D. Miss. 1993). Congress included a preemption clause (Section 41713 of the Act[2]), which was designed to ensure that states could not frustrate the benefits of deregulation by enacting their own forms of economic regulation:

> [A] state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

As set forth by Northwest, this Court has, on two other occasions, analyzed the scope of ADA preemption. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 391 (1992); *American Airlines v. Wolens*, 513 U.S. 219 (1995). In *Morales*, the National Association of Attorneys General ("NAAG") adopted Air Travel Industry Enforcement Guidelines. *Morales*, 504 U.S. at 379. These Guidelines contained detailed standards governing the content and format of airline advertising, the awarding of premiums to regular customers, and the payment of compensation for overbooked flights. The Guidelines were sent to major airlines and those airlines filed suit asserting that state regulation of fare advertising is preempted under § 1305(a)(1) of the ADA. *Id.* at 380. As a result, the Court concluded that the NAAG fair advertising guidelines were

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[2] 49 U.S.C. § 41713(b)(1).

preempted under the ADA. *Id.* at 390.[3] However, the Court limited the scope of its ruling:

> [W]e do not, as Texas contends, set out on a road that leads to pre-emption [sic] of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions [sic]) would similarly "relate to" rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw*, "some state actions may affect [airlines fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive [sic] effect. 463 U.S. at 100, n.21 [emphasis added]. In this case, as in *Shaw*, "the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line." *Ibid.*

Id. (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983). The Court in *Morales* was clear that simply because a suit involved an airline or an aspect of air travel

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[3] In addition to the above, it is important to note that in Justice Stevens' well reasoned dissent he stressed to the Court that, with this ruling, they were wandering down a dark road. Indeed, as Justice Stevens noted, "[s]urely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar 'significant impact' upon their rates." *Id.* at 427 (Stevens, J., dissenting).

the suit was not *ipso facto* preempted unless it ran afoul of the goals underlying deregulation.

This Court was faced with ADA preemption again in the *Wolens* case. *Wolens* involved a claim for violation of the consumer protection act as well as a claim for breach of contract. In allowing the contract claim to proceed, the Court found it was not "plausible that Congress meant to channel into the federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Wolens*, 513 U.S. at 232. The Court found that "[t]he conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's savings clause." *Id.* (citing 49 U.S.C. App. § 1506 (recodified at 49 U.S.C. § 40120)).

According to Northwest, "in the wake of *Morales* and *Wolens* a striking conflict among the circuits has developed concerning the proper application of section 105(a)(1) to other kinds of state law tort claims and concerning the meaning of 'service' in that section." Pet. 10. This statement is wrong. While two circuit courts have formulated definitions of "service" that may differ; their decisions, as well as district court decisions, on "the proper application of section 105(a)(1) to" physical injury cases are harmonious. *See infra*, Part I, B.[4] As a result, the

[4] *See e.g., Heller v. Delta Air Lines, Inc.*, 1993 U.S. Dist. Lexis 11854 (S.D.N.Y. 1993) (where a claim by a passenger who sustained injuries from luggage falling from an overhead bin was not preempted); *Plagianos v. American Airlines, Inc.*, 912 F.2d 57, 59 (2d Cir. 1990) (where the Second Circuit set forth the standard of care for negligence claims against airlines from fallen luggage without even mentioning the potential for ADA preemption); *Margolis v. United*

differing definitions of "service" are immaterial in those types of cases.

B. There is No Conflict Among the Circuits

According to Northwest, the Circuit most at odds with the panel's decision in this case is the Fifth Circuit. Specifically, Northwest points to *Hodges v. Delta Airlines*, 44 F.3d 334 (5th Cir. 1995), which has defined "services" in a way that is different from the definition enunciated in the Ninth Circuit. However, an objective recitation of the *Hodges* opinion demonstrates that the panel's decision in this case is in accord with the *Hodges* decision. Importantly, neither circuit holds as preempted a physical injury claim against an airline.

In *Hodges*, a passenger was injured when a box of rum fell from an overhead bin and cut her arm and wrist. 44 F.3d at 335. The sole question before the court was whether her personal injury claim against the airline was preempted. *Id.* The court engaged in a discussion about both the *Morales* and *Wolens* cases noting that the Supreme Court warned "'some state actions may affect [airline

Airlines, Inc., 811 F. Supp. 318, 321 (E.D. Mich. 1993) ("state common law claim based on negligence and the standard of reasonable care does not purport to regulate the service that air carriers provide to their customers in exchange for their fares"); *Somes v. United Airlines, Inc.*, 33 F. Supp. 2d 78, 82 (D. Mass. 1999) ("Somes' claim is a common-law based personal injury action, which concerns health and safety, an area traditionally regulated by the states pursuant to their police powers"); *Barbakow v. USAir, Inc.*, 950 F. Supp. 1145, 1148 (S.D. Fla. 1996) ("Read together, the preemptive and enabling provisions do not require a negation of traditional common law tort remedies to recover damages for negligence resulting in physical harm."). *See also, infra* Part I, B.

services] in too tenuous, remote or peripheral a manner' to be preempted." *Hodges*, 44 F.3d at 336 (citing *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines*, 463 U.S. at 100 n. 21)) (alteration in original).

When determining the scope of the term "service," the *Hodges* court reviewed the panel's decision in its case and merely stated that it "adhered" to the panel's definition of service *en banc*. *Hodges*, 44 F.3d at 336. However, contrary to Northwest's suggestions, this definition of "services" was not the sole basis for the court's decision. Rather, the court took into account the fact that airlines are required to maintain insurance "that covers 'amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person . . . .'" *Id.* at 338 (citing 49 U.S.C. App. § 1371(q) (1994)). Like many other federal courts, including the Ninth Circuit, the court found that "[a] complete preemption of state law in this area would have rendered any requirement of insurance coverage nugatory." *Id.*; *See also Charas*, 160 F.3d at 1265 ("Complete preemption of state law in this arena would have rendered pointless this requirement for insurance."). Moreover, the *Hodges* court noted that there is no provision in the ADA or any of its legislative history that indicates Congress intended to displace personal physical injury claims. The court then reiterated this Court's finding in *Silkwood v. Kerr-McGee Corp.*, stating, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Hodges*, 44 F.3d at 338 (quoting *Silkwood*, 464 U.S. 238, 251 (1984)).

It thus follows that while the Fifth Circuit in *Hodges* set forth a definition of "services" that differs from the Ninth Circuit, its ruling is nonetheless harmonious

because it found, as in the Ninth, that physical injury claims are not amongst the types of claims preempted by the ADA. Specifically, "[e]nforcement of such tort duties normally will not have 'the forbidden significant effect' on airlines' services." *Hodges*, 44 F.3d at 339. Simply put, when focusing on congressional intent and economic effect, rather than the definition of the term "service" it is clear that the Fifth and Ninth circuits are consistent.

Attempting to convince the court that the differing definitions of "service" in the Fifth and Ninth Circuits will yield conflicting results, Northwest cites to *O'Carroll v. American Airlines*, 863 F.2d 11 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989). Northwest uses *O'Carroll* as an example of a tort claim preempted under the Fifth Circuit standard, which is allegedly different than the standard in the Ninth Circuit. But *O'Carroll* does not support Northwest's position that a conflict exists. As the Fifth Circuit in *Hodges* itself noted, in *O'Carroll* "[n]o claim was made that the airline breached any safety-related tort duty by bumping O'Carroll." *Hodges*, 44 F.3d at 339. Hence, while Northwest attempts to use *O'Carroll* as evidence that the Fifth Circuit solely relies on its definition of service to determine ADA preemption, and as a result, the Fifth Circuit is wholly at odds with the definition in the Ninth, the fact is, *O'Carroll* was not a personal injury claim nor did it involve any aspect of safety. "*O'Carroll* dealt with a claim for wrongful exclusion from a flight, essentially a contract action. Thus, [the airline]'s reliance on it is misplaced in the context of a negligence claim for personal injury." *Jamerson v. Atlantic Southeast Airlines*, 860 F. Supp. 821, 824 (M.D. Ala. 1994).

Northwest's citation to *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996)

suffers from the same defect that *O'Caroll* suffered. Namely, *Travel All* did not involve personal physical injury. *Travel All* was a slander and defamation case and also involved individuals being refused travel unless they purchase an entirely new ticket. It did not involve a claim for physical personal injury and it appears the Seventh Circuit has yet to be presented with such a case. As the Northern District of Illinois noted in *Torraco v. American Airlines*, decided just prior to *Travel All*, "[t]o date, the Seventh Circuit has not directly addressed the issue of whether common law tort actions against airlines for physical injuries 'relate to services' [is] within the meaning of the ADA." 1995 U.S. Dist. Lexis 19547, at *8 (N.D. Ill. 1995).[5] Because *Travel All* did not involve physical injuries, the statement by the *Torraco* court is still true today. It thus follows that, to say the decisions in the Ninth Circuit conflict with the holdings of the Seventh Circuit is premature, at best.

In *Taj Mahal Travel v. Delta Airlines*, 164 F.3d 186 (3d Cir. 1998), the Third Circuit found that a plaintiff's defamation claims were not preempted because "[a]pplication of state law in these circumstances does not frustrate Congressional intent, nor does it impose a state utility-like regulation on the airlines." *Id.* at 195. Northwest cites to *Taj Mahal* for the proposition that circuit courts are now starting to take sides. Pet. 16. However, while Ms. Duncan maintains that *Taj Mahal* was properly decided, for purposes of Northwest's petition for certiorari

[5] In *Torraco*, the court found that Torraco's claims arising out of American's failure to provide him with a wheelchair, which resulted in him falling and suffering physical injury were "not preempted under Section 1305." *Torraco*, 1995 U.S. Dist. Lexis 19547, at *15.

it is of limited application, as it does not involve a personal injury claim.[6]

Northwest continues its citation to inapplicable authority with *Parise v. Delta Airlines*, 141 F.3d 1463 (11th Cir. 1998), Pet. 14, suggesting that the Eleventh Circuit is also in conflict with the opinion in this case. However, as a district court within the Eleventh Circuit had found a few years prior to *Parise*, "the Eleventh Circuit has not addressed the issue of whether or not § 1305(a)(1) preempts common law tort actions for physical injuries against airlines." *Jamerson v. Atlantic Southeast Airlines*, 860 F. Supp. 821, 826 (M.D. Ala. 1994). Because *Parise* does not involve physical injuries, the Eleventh Circuit has still not addressed the issue. Importantly, however, the Middle District of Alabama in *Jamerson* speculated that, if faced with the issue of personal injury claims against airlines, the Eleventh Circuit would not preempt personal physical injury claims. 860 F. Supp. at 826 (citing *Kay v. USAir, Inc.*, 1994 U.S. Dist. Lexis 10662 (E.D. Pa. 1994)[7]; *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318 (E.D.

[6] Northwest suggests that Ms. Duncan's claim is preempted as a matter of field preemption under *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999). Pet. 16, n.6. Though Northwest's suggestion is misleading, more importantly, it is immaterial. As the Third Circuit noted, "[e]ven though we have found federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violation of those standards." *Id.* at 375; *see also, Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989) ("[s]tate courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel").

[7] In *Kay*, the court found preemption clause does not apply to claim for personal injuries suffered when disembarking airplane. 1994 U.S. Dist. Lexis 10662, at *7.

Mich. 1993)).[8] Other district courts within the Eleventh Circuit are in accord with the findings of the *Jamerson* court. *See e.g., Barbakow v. USAir, Inc.*, 950 F. Supp. 1145, 1148 (S.D. Fla. 1996).[9] In the end, the Eleventh Circuit has not even reached the issue before the Court and, more importantly, district courts within the Eleventh Circuit that have addressed the issue are harmonious with the findings of the Ninth Circuit.[10]

C. The Practical Impact of the Unanimous Holdings of the Federal Courts is that Airlines Will be Held to the Same Standards As Any Tortfeasor When They Cause Personal Physical Injury

Northwest attempts to elicit sympathy from this Court by stating that under the conflicting authority, airlines could be subject to different state regulations from state to state. Pet. 19-20. For example, Northwest argues that "the split among the circuits" will cause differing rules on boarding policies and the like from state to state. Pet. 19. But the only policy involved in this case is Northwest's

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[8] The court in *Margolis* found that "Congress has expressed no intent to preempt traditional state law claims for negligence." 811 F. Supp. at 323.

[9] The *Barbakow* court stated that "[i]t is not shown from the case law that Congress left no room for the States to act in providing a remedy for personal injury claims caused by an air carrier's negligence." 950 F. Supp. at 1148.

[10] Northwest again misses the mark with its citation to *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998), Pet. 14. *Smith* did not involve a personal physical injury claim. As demonstrated throughout this opposition, court after court has unanimously held that a personal injury claim creates a distinction with a difference.

smoking policy. And whether Northwest is liable for damages based on an allegation that this policy caused physical injury. Ms. Duncan is not trying to regulate the smoking policy. Even if she wanted to, she could not as the federal government has already determined that smoking on airlines is prohibited. Pet. 3, n.1. Hence, the only issue left is whether Northwest is liable to Ms. Duncan for money damages resulting from the physical injury. A tort award in this case is a far cry from state regulation of "such matters as whether airlines may permit first-class passengers to board first." Pet. 19.

Moreover, as discussed more fully, *infra* Part II, Northwest's claims of "patchwork regulation" are unfounded, as the court in *Somes v. United Airlines, Inc.*, 33 F. Supp. 2d 78 (D. Mass. 1999) recognized:

> [The argument that] Congress' deregulatory goal of avoiding patchwork regulation of airlines compels the conclusion that it must have had an expansive view of airline 'services' is without merit. It fails to recognize that all state claims, whether they have the 'forbidden significant effect' on '... service' or not, potentially subject airlines to patchwork regulation. . . . [L]iterally applied, United's definition of 'services' amounts to an argument for total preemption – a proposition that has been rejected by the Supreme Court.

Id. at 84 (citing *Wolens*, 513 U.S. at 234. In addition to the lack of merit, its claims of "patchwork regulation" are nothing more than sheer speculation. Northwest hypothecates about what could happen to its business from

state to state – but to date – nothing has and it is unlikely that it ever will.

II. EXPOSING AIRLINES TO LIABILITY FOR PERSONAL INJURY CLAIMS DOES NOT RUN AFOUL OF CONGRESSIONAL INTENT AND IS NOT OF SUCH IMPORTANCE THAT REVIEW IS WARRANTED

With its back against the wall, Northwest cries for review on the grounds that "the Ninth Circuit's approach is clearly wrong." Pet. 21. Supreme Court Rule 10 sets forth that review on writ of certiorari "is not a matter of right, but of judicial discretion." As stated in the rule, a petition will only be granted for "compelling reasons." *Id.* While not an exhaustive list, Rule 10 does set forth three reasons it deems compelling. Unfortunately for Northwest, believing that a court has taken a "wrong approach" is not enumerated within Rule 10. Even if a petitioner could seek review on such a ground, it would be unhelpful in this case.

According to Northwest, the Ninth Circuit "has adopted a definition of the word 'service' that renders it entirely redundant of the immediately preceding word 'route.'" Pet. 21. Yet, absent from Northwest's argument is a judicial interpretation of the word "route." Hence, there is no way of knowing at this point and time whether the two terms are in fact, redundant. Regardless, this type of semantical gamesmanship is unnecessary in cases involving claims for personal physical injury. Indeed, even Northwest's leading case on establishing "the conflict" notes that personal physical injury cases are simply too tenuously related to any type of service – regardless of the definition. *Hodges*, 44 F.3d at 339 ("Enforcement of such

tort duties normally will not have 'the forbidden significant effect' on airlines' services.").

Northwest contends that Ninth Circuit's refusal to include various "amenities" in the term "services" has stifled its ability to compete because it is through these "services and amenities that help to distinguish one airline from another in the competitive marketplace." Pet. 21. Ms. Duncan proposes that permissible forms of competition do not include requiring employees to suffer continuous exposure to toxic fumes with no accountability. Sacrificing human health and lives to maintain a competitive edge is at all times culpable behavior. If human lives are no longer sacred it is alarming to think what the future holds for the type of "services" airlines will offer to bolster their competitive edge. In addition, this Court has already acknowledged that the ADA is not so broad as to lead "to pre-emption [sic] of state laws against gambling and prostitution as applied to airlines." *Morales*, at 390. In light of this admonition, if an airline sought to offer the service of gambling or prostitution on flights in order to bolster sales and "effectively compete" these would not be permissible.

Northwest asserts that the Ninth Circuit was wrong because it ignored the findings of the Civil Aeronautics Board that "smoking rules" are included in "services." Pet. 22. However, the Civil Aeronautics Board also found that its findings with respect to "smoking" are not binding in the arena of workplace safety:

> The Board recognizes that flight attendants, because of longer exposure, are in a different position from passengers with respect to passive smoking. Their working conditions,

> however, are the direct concern of some agency other than the CAB.

44 Fed. Reg. 9948 (1979).[11]

According to Northwest, the Ninth Circuit is also wrong because "if an airline's policies conflict with the policies of any given state, that state's laws and policies will control." Pet. 21-22. This is simply an inaccurate interpretation of the Ninth Circuit's holding in this case. First, it was Northwest's own business decision that determined smoking was no longer permitted. It was not the threat of a tort damage award. Second, even if Northwest had not banned smoking on its own, the issue was recently foreclosed by federal smoking regulations. *See* Pet. 3. Third, and by way of example, both the Fifth and Ninth circuits clearly allow for a damage award in cases where luggage falls from the overhead bin and physically injures a passenger. *See Hodges; Charas.* Despite these tort awards, airlines continue to allow carry-on luggage. This demonstrates that an award of damages in

[11] It is not clear what "agency other than the CAB" is in fact concerned with flight attendant's working conditions. The CAB likely was referring to the FAA. But as the Seventh Circuit noted, "state courts award damages every day in air crash cases, notwithstanding that federal law preempts the regulation of safety in air travel," no doubt because "[t]he Federal Aviation Act does not expressly preempt state damages remedies." *Bieneman v. City of Chicago,* 864 F.2d 463, 471 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989). Indeed, FAA safety regulations merely establish minimum standards. They do not preclude a finding of negligence under state standards where a reasonable person would take additional precautions. *Sunbird Air Servs., Inc. v. Beech Aircraft Corp.*, 789 F. Supp. 360, 362-63 (D. Kan. 1992); *see also Holliday v. Bell Helicopters Textron, Inc.*, 747 F. Supp. 1396, 1401 (D. Haw. 1990) ("nothing in the FAA indicates that states may not require aircraft to be more safe or better designed").

these cases involving physical injury does not affect an airline's ability to compete. Moreover, it also demonstrates that, despite differing definitions of "services," the rule of law as to physical injury claims are in accord.

Finally, Northwest argues that the Ninth Circuit's decision conflicts with this Court's finding because the Ninth Circuit has refused to "allow preemption of any tort claim even if it would have the indirect effect of forcing the airline to alter the routes it chooses to fly." Pet. 23. This is simply untrue. The court below found that the relationship in this case to a preempted service was too tenuous to warrant preemption. Pet. App. 7a. The finding was based on the fact that "all successful tort suits . . . invariably carry with them an economic cost for the defendant airline. Such cases may even, in some instances, cause the airline to decide to make changes in its operations." *Id.* However, "the imposition of liability as a result of a personal injury action does not sufficiently interfere with the objectives of airline deregulation to warrant preemption of the action – in other words, the connection between an award in a tort case and an airline's 'services' is simply too tenuous." *Id.* This is not an "unyielding" interpretation. Pet. 23. It simply states that holding airlines responsible for their negligent conduct that causes physical harm may cause the airline to change its operations, or, it may not. The point made is that airlines are free to compete; however, when, as a result of their competition, they cause physical injury to passengers or crew, they can be held legally liable for those injuries.

Much to the disappoint of the airlines, this case simply presents no issue appropriate for Supreme Court review. The circuits are in harmony and Congressional intent is not being frustrated. Supreme Court precedent,

circuit court holdings and provisions within the ADA all point to the fact that Congress never intended to preempt personal physical injury claims. It would simply be premature for the Supreme Court to rule in the area of physical injury claims when there are only two circuit court decisions to date and these decisions do not conflict. Moreover, because many circuits have yet to address physical injury claims against airlines – but district courts within those circuits suggest that the circuit court would rule harmoniously – time may further illuminate how other circuits will address the issue. *See generally Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955); *See also Columbus Fruit & Vegetable Cooperative Ass'n v. United States*, 8 Cl. Ct. 525, 529 (1985) (citing *United States v. Mendoza*, 464 U.S. 154 (1984)) (Emphasizing the benefit derived "'from permitting several courts of appeals to explore a difficult question,' because, in deciding whether to grant a petition for certiorari, the Supreme Court adheres to a practice of waiting for conflicting decisions to arise with respect to a particular issue."). Hence, this case does not present the type of "compelling reason" contemplated by Supreme Court Rule 10.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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